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2002]

## "COLLATERAL DAMAGE": NO RE-ENTRY FOR DRUG OFFENDERS

NORA V. DEMLEITNER\*

SINCE the events of September 11, 2001, much of the public debate has centered on the so-called "war on terrorism." In the meantime, the war on drugs has receded further into the background despite some connections between the two.<sup>1</sup> However, that "war" has not ended, and its damage remains palpable.

While the large-scale imprisonment of drug offenders is being widely discussed,<sup>2</sup> less well-known are the so-called "collateral consequences" that frequently follow automatically from a drug conviction.<sup>3</sup> They hinder individual offenders' rehabilitation and reintegration into society by restricting welfare benefits, employment and skills training opportunities, and the re-union with family. For non-U.S. citizens, a drug conviction usually means deportation and a decades-long ban on re-entry. While "collateral restrictions" that are closely tied to the risk an individual offender poses

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1. For a linkage of the two "wars," see Tim Golden, *The World: A War on Terror Meets a War on Drugs*, N.Y. TIMES, Nov. 25, 2001, §4, at 4 (describing Osama Bin Laden's alleged connection to "super-heroin" and funding of rebels in Colombia through sale of narcotics); Barry Meier, *"Super" Heroin Was Planned by bin Laden, Reports Say*, N.Y. TIMES, Oct. 4, 2001, at B3. Since late January 2002, government sponsored television spots and newspaper ads have further highlighted the linkage between the two. Drug users have been portrayed as funding terrorism, largely in Colombia.

2. See, e.g., Franklin E. Zimring & Gordon Hawkins, *Legislating Federal Crime and Its Consequences: Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 18 (1996) (discussing disproportionate imprisonment for drug crimes, accounting for 42% of prison population). For the first time since 1972, the number of people in state prison fell, albeit so slightly, in 2000. The drop has been particularly pronounced in California which mandates the diversion of drug offenders into treatment programs instead of incarceration. See Jenifer Warren, *Prison Becomes a Harder Sell*, L.A. TIMES, Nov. 22, 2001, § 2, at 1.

3. This Article uses the terms "collateral consequences" and "collateral sanctions" interchangeably. While the former is the more established word, indicating the civil character of such sanctions, increasingly the latter is being used to connote the seriousness of such consequences. See ABA Task Force on Collateral Sanctions, Proposed ABA Standards for Criminal Justice (Third Edition), Chapter 19: Collateral Sanctions and Administrative Disqualification of Convicted Persons (Mar. 7, 2002) (on file with author) (using phrase "collateral sanctions" and arguing for making such "consequences" part of criminal sentencing process).

(1027)

may be defensible, many of those currently imposed are not justifiable on punishment grounds. Rather, they violate the social compact and access to democratic participation. Most importantly, common sense indicates that depriving individuals access to legitimate means of survival contributes to higher rates of recidivism.

Because most of these collateral sanctions do not fulfill any purpose, and often are counter-productive, this Article calls for their abolition and for increased assistance to drug offenders upon release from imprisonment. The model for post-sentence assistance should be the "Marshall Plan." That plan assisted post-war Germany economically by providing direct benefits and the ability to become self-sufficient. To bind Germany into a Western alliance with the dual goals of preventing its re-militarization and enabling it to withstand the threat of Communism, the Marshall Plan combined economic aid with direct oversight of German economic and political development. Today the enemy is no longer Communism but future crime with its attendant consequences. Ex-offenders with prospects for personal and economic reintegration and a stake in the future of their families and their communities will withstand the temptation of crime more easily than those cut loose.

Part I discusses the concept of "war" in light of the "wars" on terrorism and drugs.<sup>4</sup> It highlights the damage that such wars inflict on the population. Part II details the collateral consequences that befall drug offenders and inhibit their reintegration potential.<sup>5</sup> The Article then turns to the societal consequences of such additional and often permanent sanctions.<sup>6</sup> The final section focuses on the Marshall Plan.<sup>7</sup> It sets out the plan as it was conceived after World War II, and then translates the concept to the "war" on drugs.

### I. THE WAR METAPHOR

Because of the high profile of the "war on terrorism," much of its impact and many of its ambiguities have been the subject of public debate.<sup>8</sup> However, many of the questions it raises are identical to those implicit—but never resolved—questions regarding the war on drugs.

The war on terrorism has made us question the "war" metaphor in ways we have not since the Vietnam War. The term "war" seems inexorably bound up with World War II, the "war" *par excellence*. It pitted against

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4. See *infra* notes 8-40 and accompanying text.

5. See *infra* notes 41-139 and accompanying text.

6. See *infra* notes 140-46 and accompanying text.

7. See *infra* notes 147-68 and accompanying text.

8. See e.g., Linda Greenhouse, *War Zone: What Price Liberty?*, N.Y. TIMES, Sept. 16, 2001, § 4, at 1; *Is Ethnic Profiling Ever Part of Good Policing As America Fights?*, ABC NEWS: NIGHTLINE, Oct. 1, 2001; *Popular Support for New Government Investigative Measures But Questions Remain*, CNN: GREENFIELD AT LARGE, Nov. 28, 2001; Serge Schmemmann, *Unsure Ground for Fight Against Atrocity*, N.Y. TIMES, Nov. 29, 2001, at B1 (debating war on terrorism).

each other two sets of powers, both of which consisted of states with specific territories and populations, that fought an open and declared war. The objective was total defeat of the other side. It was just as clear a goal as were the means used to fight this war: armed forces at sea, in the air and on land.

No armed conflict since World War II has fit this description of what we consider a traditional war as clearly.<sup>9</sup> However, the “wars” on drugs and terrorism appear the most amorphous and ambiguous of all: What does it mean to make “war” on terrorists or the so-called “drug lords”? How are the “enemies” defined? Where do we find them? What does it mean to win, or lose, such a “war”?<sup>10</sup> Equally important, when do we know that we have won, or lost—absent some cataclysmic event? How should a state deal with the “supporters” of terrorists or “drug lords”? What forms can such “support” take? How much of the so-called “collateral damage,” presumably the suffering, and deaths of innocent civilians, is acceptable in these “wars”?

Since shortly after September 11, 2001, these questions have been debated, at least in some fora.<sup>11</sup> However, we have never faced such an open policy debate—either in Congress or within the public—regarding the so-called war on drugs.

Some have postulated that the war on drugs is won once there are no more drugs in the United States, a goal of total abstinence, akin to the stated aims of (alcohol) Prohibition.<sup>12</sup> Others view a more limited—and realistic—objective as useful, such as a decrease in the number of drug addicts or first-time users.<sup>13</sup> The focus on the objectives of the “war” has often been replaced by discussions about its consequences. Some have argued that the “war” aspect of the fight against drugs applies only outside the United States, largely in Latin America where the U.S. government has

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9. In terms of warfare, World War II became the first unconventional (*i.e.*, nuclear) war, as distinguished from the wars preceding (and following) it, in which exclusively conventional weapons were used. However, the war was “conventional” in the sense that it met all the elements of the traditional definition of “war.”

10. For multiple declarations of “wars” and victories over drugs, see ARNOLD S. TREBACH, *THE GREAT DRUG WAR* 150 (1987).

11. See Deborah Barfield, *America's Ordeal*, *NEWSDAY*, Oct. 2, 2001, at A4 (discussing curtailment of civil rights in fight against terrorism); Craig Gordon & Timothy M. Phelps, *Military Tribunal Plan Detailed*, *NEWSDAY*, Mar. 21, 2002, at A18 (setting out rules for military tribunals in which alleged terrorists may be tried and assessing usefulness of interviews of Middle Eastern men in the United States as law-enforcement tool); Schmemmann, *supra* note 8, at B1 (debating humanitarian tactics of United States in war on terrorism).

12. See Juan R. Torruella, *Commentary: One Judge's Attempt At a Rational Discussion of the So Called War on Drugs*, 6 B.U. PUB. INT. L.J. 1, 1-2 (1996) (discussing similarities between some proponents' position of harsh drug laws and Prohibition).

13. See Louis Kraar, *How to Win the War on Drugs*, in *DRUGS IN AMERICA*, 37, 38-42 (Robert Emmet Long ed., 1993) (suggesting treatment and prevention methods to aid in drug war).

used its armed forces to destroy coca production.<sup>14</sup> Others would counter that the war on drugs has turned into a “war” on minorities, especially African-Americans, at home.<sup>15</sup>

In many respects the war on terrorism has come to track the war on drugs. It is being fought domestically and abroad; it has led to the curtailment of civil liberties; its goals are equally amorphous and ambiguous. We can also be assured that its victims will be manifold and its consequences will continue for decades.

Undoubtedly the battlefields of the drug war have been at home as much as abroad.<sup>16</sup> In many respects the “war” has come to resemble a civil war. It pits citizen against citizen, family member against family member, community against community. Often this has meant that it also pits one racial group against another.<sup>17</sup> People in this country, as well as abroad, have become casualties of the war on drugs.

While much of the official debate centers on the large “drug lords,” many small dealers and even drug users have been declared enemies. The treatment of drug users has, however, been contradictory. While they have been—maybe akin to a drafted soldier in a foreign army—viewed as weak individuals, they are the underlying reason for the “war.” After all, it is demand for illegal drugs in North America and Europe that fuels most of the supply.<sup>18</sup> For that reason, the view dominates that at least some punishment must be inflicted even on the drug user.<sup>19</sup> In a civil war the

14. See James Risen & Christopher Marquis, *Officials Long Debated Risk of Anti-Drug Patrol in Peru*, N.Y. TIMES, May 22, 2001, at A1 (describing recent history of United States activities in using military force to stave off drug flow from Latin American countries).

15. See Lewis H. Lapham, *A Political Opiate*, in DRUGS IN AMERICA, *supra* note 13, at 50, 55 (arguing that war on drugs is really class war).

16. See, e.g., also Eric E. Sterling, *Friendly Fire: Rethinking the War on Drugs from a Quaker Perspective*, HARV. ALUM. MAG., Spring 2000, at 2 (on file with author).

17. See, e.g., Note, *Winning the War on Drugs: A “Second Chance” for Nonviolent Drug Offenders*, 113 HARV. L. REV. 1485, 1489 (2000) (detailing racial misperceptions about users of illegal drugs); Lapham, *supra* note 15, at 54-55 (arguing that war on drugs is racially charged). A specific example of the racial overtones of the wars on drugs and on terrorism is “racial profiling.” See, e.g., Kevin R. Johnson, *U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law*, 47 VILL. L. REV. 897, 899-906 (2002) (discussing “racial profiling”); Robert V. Ward Jr., *As You Were Saying . . . Racial Profiling Not the Answer to Fight Terrorism in America*, BOSTON HERALD, Oct. 14, 2001, at 22 (arguing against blanket racial and ethnic profiling in wake of September 11, 2001).

18. For a discussion of the situation in some of the source countries, see generally Melvin Burke, *Bolivia: The Politics of Cocaine*, in DRUGS IN AMERICA, *supra* note 13, at 84; Ruth Conniff, *Colombia’s Dirty War, Washington’s Dirty Hands*, in DRUGS IN AMERICA, *supra* note 13, at 68; Robin Kirk, *Sowing Violence in Peru*, in DRUGS IN AMERICA, *supra* note 13, at 92; Elaine Shannon, *New Kings of Coke*, in DRUGS IN AMERICA, *supra* note 13, at 60.

19. See STEVEN WISOTSKY, *BREAKING THE IMPASSE IN THE WAR ON DRUGS* 32-33 (1986) (discussing relatively light sanctions imposed on drug users).

drug user becomes at least a collaborator, if not a traitor *per se*.<sup>20</sup> This strategy of targeting the drug user became more pronounced when it became obvious that focusing solely on the supply side was doomed to failure.<sup>21</sup>

A “war” requires that enemies be imprisoned once captured. In the war on drugs this has meant large-scale imprisonment. Well over one million individuals—imagine the population of the State of Rhode Island—are in prison. In 1999, approximately 251,000 of the almost 1.2 million state prisoners,<sup>22</sup> and approximately 68,000 of the almost 119,000 federal prisoners,<sup>23</sup> sentenced to more than one year in prison had drug convictions. The offenders spend a large number of years behind bars.

The number of imprisoned women who are convicted of drug offenses is higher than ever.<sup>24</sup> Female drug offenders constitute approximately one-third of all female state offenders incarcerated for more than one year.<sup>25</sup> The rising number of women in prisons is particularly distressing since many of them are mothers whose absence has a profound impact on their children.<sup>26</sup>

Equally disconcerting is the disproportionate imprisonment of African-Americans.<sup>27</sup> Almost 7% of African-American men were imprisoned

20. See KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 72-73 (1997) (noting that drug problem comes in different packages with some portraying drug users as victims while others portray users as criminals).

21. See A. Morgan Cloud, III, *Cocaine, Demand, and Addiction: A Study of the Possible Convergence of Rational Theory and National Policy*, 42 VAND. L. REV. 725, 729-30 (1989) (describing goals of legislation to reduce demand for drugs using “demand reduction strategies”).

22. See ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP’T OF JUSTICE, *PRISONERS IN 2000*, 11 tbl.16 (2001) (relating criminal statistics by offense category).

23. See Bureau of Justice Statistics, Federal Justice Statistics Resource Center, *Query the Federal Justice Statistics Database* (reporting drug conviction data for population of offenders in federal prison at end of 1999), available at <http://fjsrc.urban.org> (last visited Apr. 10, 2002).

24. See BECK & HARRISON, *supra* note 22, at 12 (noting that drug offenders accounted for largest source of total growth among female inmates—35%).

25. See *id.* at 11 (relating criminal statistics on female drug offenders).

26. See LAWRENCE A. GREENFIELD & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, *WOMEN OFFENDERS* 7 (1999) (noting that 70% of women under correctional sanctions are mothers, averaging two children); JEREMY TRAVIS ET AL., *FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY* 13 (2001) (reporting number of incarcerated woman who have children), available at [http://www.urban.org/pdfs/from\\_prison\\_to\\_home.pdf](http://www.urban.org/pdfs/from_prison_to_home.pdf).

27. See BECK & HARRISON, *supra* note 22, at 11 tbl. 16 (noting that of state inmates in 2000, almost three times as many African-Americans (144,700) as whites (50,700) served more than one year in prison for drug offenses); see also Note, *Winning the War*, *supra* note 17, at 1485-86 (in 1992, African-Americans accounted for 74% of all those sentenced for drug offenses even though only 14% of illegal drug users were African-American).

by the mid-1990s.<sup>28</sup> However, imprisonment is not the sole consequence of drug convictions.

"Punishment" for many drug offenders continues once they are released from prison.<sup>29</sup> They are usually subject to so-called "collateral consequences." Many of these are virtually unknown outside the criminal justice community,<sup>30</sup> and of some consequences, even judges, prosecutors and criminal defense attorneys are unaware.<sup>31</sup> Federal legislation creating collateral consequences for drug offenses is frequently not part of crime legislation;<sup>32</sup> it passes into law without being debated in relevant congressional committees, including the judiciary committee.<sup>33</sup>

The so-called "collateral consequences" are legally classified as civil rather than criminal sanctions.<sup>34</sup> For that reason they can be imposed without the protections and guarantees of the criminal justice system. This is particularly troubling since many of these "consequences" deny drug offenders fundamental social, economic and political rights. They impact the lives of ex-offenders dramatically and often also deprive their families of crucial governmental support.<sup>35</sup>

Collateral consequences are justified either on punitive, deterrent or preventive grounds.<sup>36</sup> The last rationale applies less to drug offenders because most collateral consequences imposed on them are not based on a

28. See Gary LaFree et al., *The Changing Nature of Crime in America*, in 1 CRIMINAL JUSTICE 1, 25 (Gary LaFree et al. eds., 2000) (describing alarming rise in rate of African-Americans incarcerated for drug convictions).

29. For the debate whether collateral consequences constitute "punishment," see, for example, G. Scott Rafshoon, Comment, *Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process*, 44 EMORY L.J. 1633, 1654-67 (1995) (arguing that collateral consequences and "civil disabilities" are additional forms of punishment).

30. See TRAVIS ET AL., *supra* note 26, at 25-26 (describing several forms of collateral consequences suffered by ex-convicts attempting to re-enter society).

31. See Interview with Robert M.A. Johnson, District Attorney, Anoka County, Minnesota; President, National District Attorneys Association (Sept. 30, 2001) [hereinafter Interview with Robert M.A. Johnson].

32. See generally Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in COLLATERAL DAMAGE: THE SOCIAL COST OF MASS INCARCERATION (M. Chesney-Lind & Marc Mauer eds., forthcoming 2002) (manuscript at 3, on file with author); *infra* notes 41-131 and accompanying text.

33. See TRAVIS ET AL., *supra* note 26, at 25-36.

34. See Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154-55 (1999) (civil sanctions are not considered punishment because many are administrative in nature).

35. See *infra* notes 109-25 and accompanying text (discussing collateral consequences that impact family life).

36. See Demleitner, *supra* note 34, at 160-61 (arguing for coherent framework for collateral consequences based on penological goals); Andrew von Hirsch, *Criminology: Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale*, 74 J. CRIM. L. & CRIMINOLOGY 209, 210-11 (1983) (suggesting general principles for evaluating formal sentencing structure).

risk model.<sup>37</sup> On the other hand, punitive and deterrent grounds have played a dominant role in the congressional discourse surrounding drug offenders. The denial of governmental benefits to drug offenders has been justified as a measure of “user accountability.”<sup>38</sup> Drug users, often considered to have made a rational choice, should be held accountable and will be held out as an example.

Given that nearly 600,000 prison inmates have been released annually in the past few years,<sup>39</sup> collateral consequences impact a large number of individuals, many of whom are drug offenders. The panoply of collateral sanctions impacting drug offenders makes it virtually impossible for them to re-enter society successfully. Secondary sanctions marginalize ex-offenders for many years after their maximum sentence has expired, and in some cases for life. They inflict substantial “collateral damage” not only on drug offenders but also on their families and communities since they hamper re-entry and reintegration.<sup>40</sup>

## II. DRUG OFFENDERS MEET COLLATERAL SANCTIONS

Collateral sanctions befall all types of offenders.<sup>41</sup> Although the public considers murder, rape and kidnapping more serious offenses than drug possession or distribution, the collateral consequences imposed on drug offenders tend to be more severe than those imposed on murderers, rapists and kidnappers. Drug offenders suffer from them disproportionately because many collateral consequences target them specifically. Next to sex offenders,<sup>42</sup> drug felons and drug misdemeanants have borne the

37. See BECKETT, *supra* note 20, at 72-73 (discussing rise of risk as concept in criminal justice).

38. See BECKETT, *supra* note 20, at 73 (noting that user accountability has become catchphrase in war on drugs). “User accountability” implies that “[u]sers pay the price if they break the law.” *Id.*

39. See Joan Petersilia, *When Prisoners Return to the Community: Political, Economic and Social Consequences*, in SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY 1, 1 (U.S. Dep’t of Justice ed., Nov. 2000), available at [www.ncjrs.org](http://www.ncjrs.org).

40. The discussion of “collateral consequences” in this Article focuses on those secondary sanctions arising from convictions for the use, possession or sale of illegal narcotics and related offenses of conspiracy or attempt. Many non-offense specific collateral sanctions also impact drug offenders. In addition, the general discussion pertaining to successful re-entry and the limitations on drug treatment applies to offenders who committed property, violent or public order offenses under the influence of illegal narcotics or to feed a drug habit. For a discussion of the number of inmates involved with illegal drugs, see Steven Belenko, *The Challenges of Integrating Drug Treatment into the Criminal Justice Process*, 63 ALBANY L. REV. 833, 873 tbl.1 (2000).

41. See, e.g., Demleitner, *supra* note 34, at 154 (describing collateral sanctions for various offenses).

42. Among the best known collateral consequences applicable to sex offenders are registration and notification requirements. For examples of the federal statutes that require states to institute such provisions, see Megan’s Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (sex offender notification statute); Act of Oct. 1996, Pub. L. 104-236, 110 Stat. 3096 (sex offender notification statute); Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act,



brunt of civil sanctions. Within the last fifteen years, the panoply of civil sanctions applicable to them has increased dramatically.<sup>43</sup>

The civil sanctions most devastating to offenders are those that deprive them of the ability to reintegrate successfully. Re-entry and rehabilitation assistance are particularly crucial to offenders with two sets of characteristics, which may overlap. First, those who have served long prison terms need substantial reintegration assistance. They have lost the ability to operate as individual agents in a less structured environment, and often have difficulty adjusting to a society and job market very different than the ones in existence when they went to prison. Because of the long sentences imposed on drug traffickers, especially in the federal system, many of them fall into this category. Second, offenders who suffer from insufficient education and job training will become likely recidivists unless they receive reintegration assistance.<sup>44</sup> However, it is precisely these offenders that are frequently excluded from the social safety net and from access to training and education because of collateral sanctions.

#### A. *Denial of Access to the Social Net*

Federal law allows for the denial of a whole set of federal benefits to drug offenders.<sup>45</sup> The Denial of Federal Benefits Program of 1988 empowers federal and state courts to prohibit drug offenders from accessing a broad range of benefits, excluding food stamps and other survival-type subsidies.<sup>46</sup> A first drug trafficking conviction can lead to the denial of benefits for up to five years; a second conviction doubles the maximum

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Pub. L. No. 103-322, 108 Stat. 1796, 2038 (codified at 42 U.S.C. § 14071 (1994)) (sex offender registration statute).

43. See Demleitner, *supra* note 34, at 155 (describing increase in collateral sanctions in mid-1980s to mid-1990s due to “‘get tough’ approach to crime”).

44. See Note, *Winning the War*, *supra* note 17, at 1491 (noting that recidivism rates for drug offenders remain high and are estimated to range from 65% to 80%).

In recent years the number of those admitted to prison for parole violations or the commission of new offenses while on parole has risen to more than one-third of all prison admissions. See TRAVIS ET AL., *supra* note 26, at 5. Of federal inmates released between 1992 and 1994, the proportion of those returning to federal prisons within three years increased from 18.2% to 18.6%. See WILLIAM J. SABOL ET AL., U.S. DEP’T OF JUSTICE, OFFENDERS RETURNING TO FEDERAL PRISON, 1986-97, at 1 (2000).

45. See SUSAN M. KUZMA, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION 10-11 (2000) (outlining federal benefits that may be revoked or limited upon conviction).

46. See 21 U.S.C. § 862 (2002) (providing for ineligibility of drug traffickers and possessors). For an exemplary list of federal benefit denial programs, see Robert W. Musser, Jr., *Denial of Federal Benefits to Drug Traffickers and Drug Possessors: A Broad-Reaching But Seldom Used Sanction*, 12 FED. SENTENCING REP. 252, 253 (2000).

possible ineligibility period;<sup>47</sup> a third conviction mandates the court bar such benefits permanently.<sup>48</sup>

Denial of survival-type welfare benefits takes collateral sanctions a step further by making critical assistance, particularly necessary after release, inaccessible.<sup>49</sup> Any drug offender convicted after August 22, 1996, becomes permanently ineligible for food stamps and temporary assistance to needy families,<sup>50</sup> unless the state of residence opts out.<sup>51</sup> So far, twenty-four states have adopted the ban,<sup>52</sup> eighteen have modified it,<sup>53</sup> and eight have opted out.<sup>54</sup> Modifications usually center around tem-

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47. See Demleitner, *supra* note 34, at 158 (discussing impact of denial of social and welfare rights). Drug possession convictions cap the maximum ineligibility period at one and five years, respectively. See *id.*

48. Between 1990 and 2000, about 3,500 federal drug offenders and 2,200 state drug offenders lost some or all of their benefits under the 1988 Program. See Musser, *supra* note 46, at 254. Its effect in federal cases is limited since most drug offenders are released after these restrictions end. See *id.* at 255.

49. See Demleitner, *supra* note 34, at 158 (discussing ultimate collateral consequence of permanent termination of all social and welfare benefits for repeat offenders); see also Thomas Hammarberg, *Not By Bread Alone . . . but Not Without Bread Either*, U.N. CHRONICLE, Jan. 1998 (noting that, under Universal Declaration of Human Rights, access to food and housing are human rights), available at <http://www.un.org/Pubs/chronicle/1998/issue4/498p18p.htm>. The International Covenant on Economic, Social and Cultural Rights, of which the United States is not a signatory, guarantees explicitly the rights to food and housing. See UNITED NATIONS, COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, GENERAL COMMENT 7; THE RIGHT TO ADEQUATE HOUSING (ART. 11(1) OF THE COVENANT): FORCED EVICTIONS, U.N. Doc. E/C.12/1997/4 (1997), at [www1.umn.edu/humanrts/gencomm/escgencom7.htm](http://www1.umn.edu/humanrts/gencomm/escgencom7.htm) (last visited Nov. 7, 2001) (discussing rights to food and housing). Most of the debate surrounding economic rights focuses on the availability of resources to implement such a right. The United States, however, does not argue that it does not have the resources to provide ex-offenders with access to food and housing, but rather that they are not worthy of such goods.

50. See 21 U.S.C. §§ 862a(a), (b), (d)(2) (2000) (describing increasingly punitive collateral consequences imposed upon drug offenders). The Temporary Assistance for Needy Families program includes all federal welfare benefits.

51. See 21 U.S.C. § 862a(d) (offering states option of opting out of enforcement of statute).

52. See, e.g., Letter from the Legal Action Center to the Office of Family Assistance, at 8 (Nov. 26, 2001) (on file with author) [hereinafter Legal Action Center Letter].

53. See, e.g., MINN. STAT. § 256D.024 (1997) (mandating five-year ban on benefits after completion of sentence unless ex-offender is in drug treatment program, has successfully completed one or has been determined not to need such treatment). Among the other states modifying the ban on food stamps and temporary assistance to ex-offenders are Florida, Illinois, Iowa, Maryland, Washington, and Wisconsin. See Legal Action Center Letter, *supra* note 52, at 8.

54. See Legal Action Center Letter, *supra* note 52, at 8 (noting that the states opting out of federal ban on food stamps and temporary assistance to ex-offenders are Connecticut, Michigan, New Hampshire, New York, Ohio, Oklahoma, Oregon, Vermont, and District of Columbia).

poral ineligibility limitations and treatment or recovery as eligibility grounds.<sup>55</sup>

Federal housing policies allow for the exclusion of drug offenders from federally subsidized or funded housing.<sup>56</sup> Drug-related activity alone may result in eviction from public housing.<sup>57</sup> The denial of public housing, therefore, does not result directly from a drug conviction. However, in the vast majority of cases, drug-related activity will come to the attention of housing authorities because of a conviction record. Unless an offender can demonstrate that she receives treatment, she will be banned from public housing. The public housing agency may consider proof of rehabilitation prior to issuing an eviction notice.<sup>58</sup>

In many cases, the existence of an illegal drug user in a household will cause the entire household to be evicted and barred from public housing.<sup>59</sup> As interpreted by the Supreme Court, the statute does not allow for an innocent owner defense.<sup>60</sup> Evictions are ultimately discretionary decisions of housing agencies based on the threat drug activity constitutes.<sup>61</sup>

Because private landlords often do not want to rent to ex-offenders, many of these ex-offenders find themselves on the street unless family members who do not reside in public housing are able to take them in.<sup>62</sup> This creates a vicious circle for the drug offender. The lack of access to food and housing makes it frequently impossible for offenders to gain employment, and the lack of employment prevents access to food and housing.

#### B. *Restrictions on Employment and Education*

Congress and the states have made it more difficult for ex-offenders to receive education and find employment after a drug conviction. Many of these provisions may not have been designed to limit an offender's employability, but rather were passed for punitive reasons. Only some are based on an assessment of the risk of re-offending. Nevertheless, the ef-

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55. The federal legislation is just one example of the increasing use of the power of the federal purse to get state compliance with restrictive and punitive federal criminal justice policies. See Travis, *supra* note 32 (manuscript at 12-13).

56. See 42 U.S.C. § 1437(1)(b) (2002); *Housing Laws Affecting Individuals with Criminal Convictions*, FACT SHEET (Legal Action Ctr., New York, N.Y. 2000).

57. A conviction for the production of illegal narcotics in federally assisted housing can lead to eviction and a permanent bar on such housing and any other federal low-income housing assistance.

58. See TRAVIS ET AL., *supra* note 26, at 35 (discussing exception housing authorities may make to ban on public housing for tenants who can prove that they are receiving rehabilitation treatment); see also 42 U.S.C. § 13662(b)(2) (2002) (providing that public housing agency or owner may consider whether applicant is rehabilitated).

59. See 42 U.S.C. § 1437(d)(1)(6).

60. See *Dep't of Hous. & Urban Dev. v. Rucker*, 122 S. Ct. 1230 (2002).

61. See *id.*

62. See TRAVIS ET AL., *supra* note 26, at 35-36 (discussing difficulties ex-offenders face finding suitable housing when they are released from prison).

fect on employment is palpable while most of the restrictions are unlikely to impact public safety because they are drawn too broadly to accomplish that goal.<sup>63</sup>

### 1. *Indirect Obstacles*

Some collateral consequences indirectly affect the employability of ex-offenders because they make it impossible for them to fulfill basic job requirements. First, congressional legislation demands the revocation or suspension of drivers' licenses for at least six months for persons convicted of drug felonies.<sup>64</sup> Despite the lack of an apparent connection between drug felonies and the use of motor vehicles, Congress mandated the loss of this "privilege" as a punitive sanction.<sup>65</sup> A state can avoid the imposition of this provision without penalty only if the state legislature and governor jointly express their opposition to the legislation.<sup>66</sup> Unexplained non-compliance will lead to the loss of 10% of the state's highway funding.<sup>67</sup>

Second, a person convicted of a felony drug offense may not receive a passport if he had crossed an international boundary or used the passport in committing the offense.<sup>68</sup> An issued passport may be revoked, even for misdemeanor drug offenses if the government finds that the offense should give rise to such a disqualification.<sup>69</sup> These restrictions are likely of lesser practical importance. In an increasingly international marketplace, however, they may limit some employment options available to an ex-offender.

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63. See Petersilia, *supra* note 39, at 3-4. Ex-offenders often have difficulties finding employment because employers are reluctant to hire individuals with a criminal record. See *id.* (noting that recent surveys indicate that 65% of employers in five major U.S. cities would not employ ex-offenders). With the wider availability and the greater ease of doing background checks, employers are more likely to screen out such applicants. Only a serious restriction in the labor pool, such as occurs during times of low unemployment, may cause a short-term change. See *id.*

For other reasons that limit the employability of ex-offenders, including lack of skills, race, relocation of jobs, changes in the job market, economic downturns and competition from welfare leavers, see WILLIAM J. SABOL & JAMES P. LYNCH, URBAN INST., PRISONER REENTRY IN PERSPECTIVE 18 (2000); TRAVIS ET AL., *supra* note 26, at 31-34.

64. See Department of Transportation and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-388, 106 Stat. 1520 (1992) (providing for revocation or suspension of driver's licenses).

65. See *id.*

66. See TRAVIS ET AL., *supra* note 26, at 13 n.44 (discussing procedure states must follow to avoid negative consequences of their refusal to implement federal legislation). As of 2001, thirty-three states had expressed their opposition to the policy while seventeen states, the District of Columbia and Puerto Rico have enacted the legislation. See *id.*

67. See 23 U.S.C. § 159 (2000) (setting out effect on state highway funding depending on whether states choose compliance or non-compliance).

68. See 22 U.S.C. § 2714(a)(1), (b)(1) (2000) (setting forth criteria for ineligibility and revocation of passports).

69. See 22 U.S.C. § 2714(b)(2) (2000) (discussing misdemeanors).

Third, federal legislation impacts a wide variety of other privileges that affect employment opportunities for all types of felons, including drug offenders. Among the most important is the ban on the possession of any firearms upon a felony conviction of a "crime punishable by imprisonment for a term exceeding one year."<sup>70</sup> Since many security jobs require employees to carry firearms, ex-felons, regardless of the offense committed or the length of time elapsed since they served their sentence, are subject to this restriction.<sup>71</sup> In addition to these indirect employment bars, some jobs are explicitly restricted.

## 2. *Direct Limitations*

Felony convictions lead to the automatic revocation of and bar on a wide variety of federal and state licenses. The denial of state employment licenses to felons has a long history.<sup>72</sup> Throughout the 1980s many states restricted the employment opportunities of parolees and ex-offenders even further, largely to symbolize their sincerity in the "war" on crime.<sup>73</sup> California, for example, prohibits parolees from working in real estate, nursing or physical therapy.<sup>74</sup> Loss of such licenses means loss of employment, and in some cases a long-term, if not permanent, bar on re-employment in a profession in which the offender may have acquired certain skills and abilities. The same applies to public employment.<sup>75</sup>

"At least six states . . . permanently bar ex-offenders from public employment."<sup>76</sup> The effect of such bars is solely punitive where the offense

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70. See 18 U.S.C. § 922(g)(1) (2000), 18 U.S.C. § 921(a)(3) (2000) (noting that term does not include offenses relating to regulation of businesses).

71. The restrictions may also carry an inverse incentive in the prosecution and conviction of offenders who carry firearms as part of their present employment. If alerted to the existence of such restrictions, prosecutors and judges may adjust charging and conviction practices to protect offenders from the inevitable loss of employment resulting from a criminal conviction that leads to the denial of firearms privileges. See Interview with Robert M.A. Johnson, *supra* note 31.

72. See generally Nora V. Demleitner, *Stopping a Vicious Cycle: Release, Restrictions, Re-Offending*, 12 FED. SENTENCING REP. 243 (2000) (providing overview of difficulties faced by released prisoners, especially difficulties in efforts to obtain employment).

73. See Petersilia, *supra* note 39, at 4; Travis, *supra* note 32 (manuscript at 10) (discussing intent of states to limit employment opportunities for ex-convicts by increasing occupational bars).

74. See Petersilia, *supra* note 39, at 4 (noting irony in state funding for rehabilitation of offenders, which includes persuading them to engage in legitimate work, while denying them such opportunities).

75. For a list of five collateral consequences of felony convictions, including restrictions on public employment, and whether these rights are restorable, see BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 1998, at 308-11 tbl.49 [hereinafter STATE COURT ORGANIZATION 1998].

76. TRAVIS ET AL., *supra* note 26, at 31 (listing Alabama, Delaware, Iowa, Mississippi, Rhode Island and South Carolina as states that impose permanent bars for public employment on ex-offenders).

committed and the risk of recidivism are unconnected to the employment.<sup>77</sup>

Federal restrictions on certain governmental programs and contracts also impact the employability of ex-offenders directly.<sup>78</sup> Many of these bars, even those imposed by regulatory agencies, are virtually automatic. Drug offenders, especially, will find it difficult to obtain waivers of such bars and reinstatement of necessary licenses.<sup>79</sup>

### 3. Education

Even more problematic than the denial of specific employment opportunities are restrictions on training and education for drug offenders. Under the 1988 Denial of Federal Benefits Program, convicted drug offenders may be denied access to government benefits, including funds to finance education and job training, upon conviction.<sup>80</sup> While the bar is discretionary and the decision rests with the sentencing judge in cases of first convictions, it becomes mandatory when the offender faces his third conviction for drug sales.<sup>81</sup>

Education grants, loans and work assistance are now being denied automatically to all those convicted of any drug offense—a felony or misdemeanor, trafficking, or simple possession.<sup>82</sup> The length of such denial depends on the number and type of convictions. One conviction for drug possession triggers a one-year denial; two convictions lead to a two-year ineligibility period; three or more convictions make the ban permanent. For drug sales, a first conviction means a two-year ban; any subsequent

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77. See also KUZMA, *supra* note 45, at 7 (noting that federal law restricts ability of ex-offenders to hold certain positions within labor unions or employee benefits plans). This disability is time limited and may be removed by the sentencing court. See *id.*

78. See Demleitner, *supra* note 34, at 154.

79. See KUZMA, *supra* note 45, at 5 (noting federal statutes that mandate loss or ineligibility of employment licenses upon drug conviction).

80. See Musser, *supra* note 46, at 253-54 (discussing effects of Denial of Federal Benefits Program on federal benefits of convicted felons).

81. See *id.* at 256 n.1 (describing sanctions imposed on felons receiving third and subsequent convictions).

82. See 20 U.S.C. § 1091(r) (2000) ("A student who has been convicted of any offense under federal or state law involving the possession or sale of a controlled substance shall not be eligible to receive any grant, loan, or work assistance . . .").

The limitation on federal education funding tracks the congressional elimination of prison-based higher education programs which occurred in 1994. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20411, 108 Stat. 1796, 1828 (codified as amended at 20 U.S.C. § 1070a(b)(8) (1994)) (denying Pell grants to prisoners); see also Fox Butterfield, *Tight Budgets Force States to Reconsider Crime and Penalties*, N.Y. TIMES, Jan. 21, 2002, at A1 (describing State of Illinois funding cuts for education in prison beyond high school equivalency level).

conviction leads to a permanent denial of aid. Only a showing of drug rehabilitation can end an indefinite loss.<sup>83</sup>

Congressional drafters of this legislation envisioned that students convicted of drug offenses while receiving federal aid would be deprived of such financial assistance.<sup>84</sup> The ban is currently being enforced, however, so as to deprive all ex-drug offenders of federal aid, independent of when their convictions occurred.<sup>85</sup> The denial of aid does not affect individuals convicted of offenses other than drug crimes.

Lack of an education and of marketable skills combined with the stigma of a criminal conviction make it difficult for many ex-offenders to find employment. "One year after release, as many as sixty percent of former inmates are not employed in the legitimate labor market."<sup>86</sup> How much of the difficulty in finding employment can be attributed to collateral sanctions is unclear. However, they effectively close a large number of employment opportunities, skilled and unskilled, to ex-offenders, and have made it more difficult for them to get additional skills training.

### C. Denial of Political Participation

Among the most highly publicized collateral consequences for all offenders is the denial of political rights, including the franchise and the right to serve on juries.<sup>87</sup> While these are of great symbolic value, the daily impact of their denial may be more limited, even though long-term or permanent disenfranchisement is likely to increase alienation from society.

Forty-eight states deny all prison inmates the right to vote, with most of them continuing such restriction while the offenders are under the su-

83. See also Musser, *supra* note 46, at 255 (including drug treatment as one criterion for reinstatement of federal benefits).

84. See Associated Press, *43,000 Students with Drug Convictions Face Denial of Aid*, N.Y. TIMES, Dec. 29, 2001, at A1 (voicing concern over harsh application of statute denying financial aid to drug-offending college students).

85. Even though attempts have been made to change the way in which the legislation has been implemented, so far they have failed, and the government has continued to use the broadest possible reading of the statute. See Dan Curry, *Education Department May Relax Provision Denying Student Aid to Those with Drug Convictions*, CHRON. HIGHER ED., Sept. 7, 2001, at 34.

86. Petersilia, *supra* note 39, at 4.

87. See STATE COURT ORGANIZATION 1998, *supra* note 75, at 308-11 tbl.49 (listing collateral consequences associated with felony convictions, including disenfranchisement and denial of right to serve on juries). The denial of the franchise has created concern for decades. See, e.g., Nora Demleitner, *Continuing Payment on One's Debt to Society*, MINN. L. REV. 753, 766 (2000). The issue, however, became highly visible upon release of a study demonstrating the disproportionate impact of disenfranchisement on African-Americans, and later with the 2000 presidential election. See Petersilia, *supra* note 39, at 5. The debates about the Florida ballots included some discussion about the permanent disenfranchisement of all felons in that state. See Lani Guinier, *What We Must Overcome*, AM. PROSPECT, Mar. 12, 2001, at 26 (criticizing Florida's disenfranchisement laws which precluded more than 40,000 disenfranchised ex-felons from voting in presidential elections).

pervision of the criminal justice system.<sup>88</sup> More than a dozen states, however, go substantially farther by permanently denying the right to vote to ex-offenders.<sup>89</sup> As of 1998, almost four million Americans were permanently deprived of the franchise, with 1.4 million being African-American.<sup>90</sup>

While this restriction applies to all offenders, the war on drugs has led to the criminal justice system's disproportionate focus on drug offenders. Therefore, many of those temporarily or permanently deprived of the right to participate in the polity are drug offenders. The racial make-up of drug offenders, resulting in part from enforcement strategies, accounts for an increasing number of African-American men—and women—being disenfranchised.

Even though legislative and litigation-based efforts are under way to restore the voting rights of ex-offenders who are no longer under supervision of the criminal justice system,<sup>91</sup> so far many of them have remained unsuccessful.<sup>92</sup> While many citizen drug offenders lose their voting rights upon a drug conviction, non-citizens usually lose their right to stay in the United States.<sup>93</sup>

#### D. *Deportation*

Some of the most dramatic sanctions that can befall a drug offender are immigration-related. Non-U.S. citizens are inadmissible if they admit to having committed or have been convicted of a drug-related offense.<sup>94</sup> Federal law also allows the immigration service to deny admission to suspected drug traffickers and their family members, even if they are not criminally convicted.<sup>95</sup>

Criminal convictions make non-citizens who are in the United States removable, even if they hold permanent residency status. Any conviction of a drug offense, other than possession of thirty grams or less of marijuana for one's own use, leads to deportation.<sup>96</sup> Drug users and addicts

88. See STATE COURT ORGANIZATION 1998, *supra* note 75, at 308-11 tbl.49 (outlining collateral consequences of felony convictions, including denial of right to vote, by state).

89. See *id.*

90. See JAMIE FELLNER & MARC MAUER, HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 8 (1998) (discussing racial impact of disenfranchisement laws).

91. See Demleitner, *supra* note 34, at 162 (discussing restoration of voting rights to ex-felons); Margie Hyslop, *Some Maryland Felons to Get Vote*, WASH. TIMES, Apr. 7, 2001.

92. But see Demleitner, *supra* note 34, at 162 (discussing lack of state willingness to adopt laws to restore voting rights to ex-offenders).

93. See *id.* (discussing severity of consequences facing aliens with felony drug convictions).

94. See 8 U.S.C. § 1182(a)(2)(A), (B) (2000).

95. See 8 U.S.C. § 1182(a)(2)(C), (H) (2000).

96. See 8 U.S.C. § 1227(2)(B)(i) (2002).



are also deportable.<sup>97</sup> Since under current law a conviction for drug trafficking constitutes an "aggravated felony,"<sup>98</sup> the offender is disqualified from relief from removal because he cannot establish "good moral character."<sup>99</sup> Two misdemeanor drug possession convictions will be treated as "aggravated felonies" which make the non-citizen automatically deportable, irrespective of his or her background.<sup>100</sup> For new permanent residents the law is even less forgiving. A single drug possession conviction can lead to mandatory deportation even if the criminal court assessed only a probationary sentence.<sup>101</sup> Although the 1996 immigration legislation has not been interpreted to apply retroactively,<sup>102</sup> long-term permanent resident aliens who have led law-abiding lives for many years following a minor drug conviction may also be deported to their countries of citizenship. Unless personal, familial or societal considerations weigh in favor of keeping the ex-offender in the United States, deportation will occur, even though the ex-offender may have only very limited ties or no connection to his country of citizenship.

The only possible avenue to avoid deportation is usually through a pardon.<sup>103</sup> Expungement of a drug conviction is insufficient to prevent deportation.<sup>104</sup> Some circuits, however, have deemed expunged convictions under the Federal First Offender Act (FFOA), which applies solely to first-time drug offenders guilty of simple possession, and similar state provisions not to constitute convictions for purposes of removal proceed-

97. See 8 U.S.C. § 1227(2)(B)(ii) (2000).

98. See 8 U.S.C. § 1101(a)(43)(B) (2000).

99. See *INS v. St. Cyr*, 533 U.S. 289, 314-26 (2000) (describing changes in removal procedures); David Martin, Testimony Before the Ad Hoc Committee on Irish Affairs Concerning the Deportation and Exclusion of Persons Who May Have Committed Criminal or Terrorist Attacks (Feb. 6, 1997), available at <http://www.ins.usdoj.gov/graphics/aboutins/congress/testimonies/1997/970206.pdf>.

Deportation of drug offenders carries foreign policy consequences for the United States. Many countries are unwilling or at least reluctant to take back their citizens, in part because they fear that the ex-offenders establish drug routes between their countries and the United States, and in part because they do not consider these ex-offenders their responsibility. To prevent the commission of crime by these uprooted deportees, the receiving countries must engage in extensive and broad-ranging efforts, which are often costly, to integrate them.

100. For a critique of the "aggravated felony" classification, see Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Law and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939-41 (2000).

101. See *id.* at 1941.

102. See *St. Cyr*, 533 U.S. at 326.

103. See CARL F. HOROWITZ, AN EXAMINATION OF U.S. IMMIGRATION POLICY AND SERIOUS CRIME (2001), available at [www.cis.org/articles/2001/crime/release.html](http://www.cis.org/articles/2001/crime/release.html). Drug offenders are statutorily precluded from naturalizing. Therefore, the avenue by which deportation could be prevented is not open to them.

104. See, e.g., *Murillo-Espinoza v. INS*, 261 F.3d 771 (2001); *In re Roldan-Santoyo*, No. A90 286 629, 1999 WL 126433 (BIA Mar. 3, 1999); see also Nathalie A. Bleuzé, Casenote, *Matter of Roldan: Expungement of Conviction and the Role of States in Immigration Matters*, 72 U. COLO. L. REV. 817 (2001).

ings.<sup>105</sup> One federal court of appeals has held that foreign expungement of such convictions should be treated identically with FFOA expungements.<sup>106</sup>

The war on drugs has caused the incarceration of thousands of non-citizens. Some studies indicate that non-citizens are “disproportionately incarcerated for drug-related crimes.”<sup>107</sup> In federal court, non-citizens constituted almost one-third of all drug offenders, but only one-tenth of all other offenders.<sup>108</sup> Therefore, collateral consequences of drug convictions and the excesses of the war on drugs disproportionately impact non-citizens. Deportation is one of the harshest collateral sanctions because the ex-offender loses his or her right to stay in the United States and is precluded from re-entering for decades.<sup>109</sup>

### E. Family Life

Other collateral consequences impact select offender populations, such as offenders who are parents. More than one-half of male and two-thirds of female prisoners are parents of minor children.<sup>110</sup> The denial of welfare benefits, including Temporary Assistance for Needy Families (TANF), presents particular problems for ex-offenders with children. For many of them their inability to access food stamps and public housing makes it either impossible to reunite with their children or prevents them from creating a suitable living environment.<sup>111</sup> The latter leads to educational difficulties for the children, lack of parental supervision and even maltreatment.<sup>112</sup> Although these collateral consequences have negative effects on the family lives of men and women, women—mothers—may be

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105. See Lujan-Armendariz v. INS, 222 F.3d 728, 749-50 (9th Cir. 2000).

106. See Dillingham v. INS, 267 F.3d 996, 1011 (9th Cir. 2001) (“[E]qual protection bars the government from discriminating against aliens who have committed substantially identical offenses and have had their convictions expunged under substantially identical statutes, solely because of where the offense occurred.”).

107. See HOROWITZ, *supra* note 103, at [www.cis.org/articles/2001/crime/release.html](http://www.cis.org/articles/2001/crime/release.html); see also Morawetz, *supra* note 100, at 1945-46.

108. See Stephen Demuth, *The Effect of Citizenship Status on Sentencing Outcomes in Drug Cases*, 14 FED. SENTENCING REP. (forthcoming 2002) (manuscript on file with author) (discussing effect of citizenship status on sentencing decisions).

Despite the dramatic effect of a drug conviction, some courts have held that failure to inform the defendant of the likelihood of his or her deportation does not invalidate a plea agreement. *United States v. Amador-Leal*, 276 F.3d 511, 517 n.4 (9th Cir. 2002) (explaining that “there is no *due process* requirement for defendants to be informed of immigration consequences because immigration consequences are collateral”) (emphasis added).

109. See 8 U.S.C. § 1182(9)(A) (2002).

110. See Petersilia, *supra* note 39, at 4 (discussing negative impact of collateral consequences on family unit).

111. PATRICIA ALLARD, *LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES* 8, 10-12 (2002).

112. See *id.* at 13-14.

disproportionately impacted.<sup>113</sup> Because of the enforcement strategies used in the war on drugs, Latina and African-American women and their families in particular are the victims of the lifetime welfare ban.<sup>114</sup>

For parents, legislation designed to prevent children from staying in foster care long-term also has a dramatic impact.<sup>115</sup> Such adoption/foster care legislation allows for the termination of parental rights once children spend fifteen of the last twenty-two months in foster care.<sup>116</sup> Therefore, long-term incarceration during which the offender is not able to place her children with relatives or friends can cause her to lose access to her children permanently unless she can show a "compelling reason" not to terminate her parental rights.<sup>117</sup> Since the average female drug offender serves eighteen months in prison, upon her release she may be denied the right to reunite with her family.<sup>118</sup> The aim of the legislation was to make children more quickly available for adoption, and thus, to provide a stable family environment for them.<sup>119</sup> However, it has a detrimental impact on those drug offenders who would be willing and able to provide for their children except for their incarceration. Parents often consider the termination of their parental rights an additional sanction.<sup>120</sup>

Ex-drug offenders are also unable to become foster parents if they were convicted of a drug felony within the last five years.<sup>121</sup> The only ex-

113. *See id.* (focusing on women convicted of drug offenses). Detailing the impact of collateral consequences on female offenders and their children may be an effective strategy to garner public attention and bring about legislative changes. Male offenders generally, and male drug offenders in particular, do not tend to engender sympathy.

114. *See id.* at 6-7 tbl. 3.

115. *See* Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.); Lanett P. Dalley, *Imprisoned Mothers and Their Children: Their Often Conflicting Legal Rights*, 22 HAMLINE J. PUB. L. & POL'Y 1, 20 (2000) (characterizing legislative grounds for termination of parental rights as too constricting).

Having an incarcerated parent creates substantial problems for children. *See* Petersilia, *supra* note 39, at 4. Although little is known regarding the specific effects on children, collateral consequences encountered by parents—such as difficulty finding housing, employment or childcare—are likely to have a "significant" effect on their children. *See id.*; *see also* Note, *Winning the War*, *supra* note 17, at 1490. It is unclear whether adoption ameliorates or aggravates this situation.

116. *See* Dalley, *supra* note 115, at 19-22 (discussing criteria that lead to termination of parental rights).

117. *See id.* at 25 (discussing likelihood of termination of parental rights due to incarcerated mother's legal and physical situation).

118. *See* Travis, *supra* note 32 (manuscript at 40) (discussing length of jail term of female drug offenders in relation to loss of paternal rights).

119. *See* Dalley, *supra* note 115, at 31 (weighing parental rights against child's best interests).

120. *See* Erica D. Benites, Comment, *In Defense of the Family: An Argument for Maintaining the Parental Rights of Incarcerated Women in Texas*, 3 THE SCHOLAR: ST. MARY'S LAW REVIEW ON MINORITY ISSUES 193, 197 (2001).

121. *See* 42 U.S.C. § 671(a)(20)(A)(ii) (2001) (denying foster care for person convicted of felony drug offense within past five years).

ception applies when the restriction would impose exceptional hardship under the best interest of the child standard.<sup>122</sup>

The adoption/foster care legislation does not fall into the same category as the other collateral consequences discussed. Its goal lies outside the criminal justice system and, thus, does not aim to punish or deter ex-offenders. Nevertheless, its impact on drug offenders cannot be overestimated in light of the growing number of incarcerated women (and men), many of whom are single parents.<sup>123</sup>

While studies documenting the effect of disenfranchisement on ex-offenders, for example, are virtually non-existent, recent re-entry related work indicates that *family* constitutes the most important element for successful reintegration.<sup>124</sup> Most of the incarcerated women expect to live with their children upon release,<sup>125</sup> and that expectation gives many of them the necessary incentive to start a law-abiding life.<sup>126</sup> Being deprived of such a powerful incentive leads to resignation and fatalism, precursors of a return to crime.

#### F. *Restoration of Rights*

Collateral consequences become inapplicable when an offender's civil rights are restored. In a minority of states, all rights of ex-offenders are restored automatically at the end of incarceration or when the maximum sentence has expired.<sup>127</sup> In other states, ex-felons have access to an administrative procedure for restoring all or some of their rights.<sup>128</sup> The restoration of rights may occur through the sealing of records or through statements of rehabilitation.<sup>129</sup> Certificates of rehabilitation remove automatic disqualifications for certain jobs even though they do not erase the conviction. Sealed records, on the other hand, are not accessible to most employers.<sup>130</sup> The final group of states allows restoration only through

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122. See 42 U.S.C. § 671(a)(15)(A) (2001) (calling child's best interest "paramount concern" of legislation).

123. See Petersilia, *supra* note 39, at 4 (noting that currently 7% of prison population consists of women, with number rising).

124. See *id.* (noting importance of family in reintegration).

125. See *id.* (discussing expectations of mothers to resume relationships with children post-incarceration).

126. See Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Non-violent Female Offenders and Their Children*, 11 STAN. L. & POL'Y REV. 133, 135 (1999).

127. See Demleitner, *supra* note 34, at 155.

128. See *id.*

129. See *id.* at 162; see also Note, *Winning the War*, *supra* note 17, at 1494-95 (noting that "Second Chance" proposal would allow for sealing of records of non-violent drug offenders if such offenders complete individual rehabilitation plan and stay in program for five years).

130. See Note, *Winning the War*, *supra* note 129, at 1495 (noting that only criminal justice and law enforcement officials have access to sealed records).

gubernatorial action.<sup>131</sup> Governors, however, are frequently reluctant to pardon ex-offenders.<sup>132</sup>

In the federal system, a presidential pardon restores the federal rights lost upon a conviction.<sup>133</sup> No statutory provision, however, governs the restoration of state rights for federal felons. Since most rights are lost because of state law provisions, federal ex-offenders are often denied certain rights forever since neither federal nor state law provides a remedy.<sup>134</sup>

Administrative agencies may grant relief from conviction-based disabilities, including deportation and the ban on military enlistment.<sup>135</sup> The Bureau of Alcohol, Tobacco and Firearms (ATF) is authorized to restore federal firearms privileges;<sup>136</sup> no funds, however, have been allocated to this program.<sup>137</sup> Currently, the Supreme Court has a case under review in which the Fifth Circuit ruled that congressional failure to provide funding does not suspend the provision of the Act under which the ATF can provide relief. The Court will have to decide whether, under the circumstances, district courts may remove firearms disabilities.<sup>138</sup>

Many collateral consequences tied specifically to drug offenses no longer apply once the offender receives drug treatment or has been rehabilitated. However, funding for treatment inside and out of prison has declined dramatically over the last decade.<sup>139</sup> Therefore, very few drug

131. See Demleitner, *supra* note 34, at 155 (discussing how this approach does not always ensure felon's "political" rights).

132. See, e.g., Sam Cardinale, *Workshop Helps Restore Rights*, LEDGER (Lakeland, Fla.), Jan. 27, 2002, at B3 (noting that fewer than 1,000 ex-felons had their voting rights restored in Florida in 2000 after applying to Governor's Office of Executive Clemency); William Glaberson, *State's Pardons Now Looked At in Starker Light*, N.Y. TIMES, Feb. 16, 2001, at A1 (discussing reluctance of some governors to issue pardons).

133. See KUZMA, *supra* note 45, at 13 (noting that among these rights are right to vote, right to serve on jury and right to hold public office); Margaret Love, *Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning*, 13 FED. SENTENCING REP. 125, 125 (2001).

134. See KUZMA, *supra* note 45, at 14 (noting need for program because restoration of rights of ex-felons is matter of state law).

135. See *id.* at 15 (discussing relief granted by various administrative agencies).

136. See 18 U.S.C. § 921(a)(33)(B)(ii) (2000) (restoring firearm rights of convicted felons).

137. See KUZMA, *supra* note 45, at 19-23 (noting that restoration of firearms privileges has been confusing and heavily litigated).

138. See *Bean v. Bureau of Alcohol, Tobacco & Firearms*, 253 F.3d 234 (5th Cir. 2001), *cert. granted*, *Bean v. United States*, 122 S. Ct. 917 (Jan. 22, 2002) (No. 01-704).

139. See Petersilia, *supra* note 39, at 2 (noting that in-prison substance abuse programs lack participation incentives and are only minimally available). Only 13% of the seventy to eighty-five percent of state prisoners who need treatment for substance abuse receive it while imprisoned. See *id.* Similarly, only a small percentage of offenders receive drug treatment while on probation. See Belenko, *supra* note 40, at 837; ALLARD, *supra* note 111, at 21-24 (highlighting difficulties for low-income women in receiving drug treatment).

offenders are able to avoid the collateral consequences associated with drug convictions.

### III. THE CONSEQUENCES OF "COLLATERAL CONSEQUENCES"

The denial of economic, social and political benefits and rights at best delays the reintegration of ex-drug offenders into society. At worst, it leads them back to prison. The difficulties these ex-offenders face also affect their families and communities negatively, often because they create greater instability, anomie and ultimately higher crime rates.

#### A. *Criminal Sanctions*

Any violation of the post-conviction restrictions imposed on drug offenders constitutes a criminal offense. The State of Virginia, for example, prosecuted convicted felons for voting in state elections.<sup>140</sup> The United States government will prosecute any Pell grant applicant who untruthfully answers the question whether he or she has ever been convicted of a drug offense.<sup>141</sup> The violation of collateral consequences has the most dramatic impact on convicted felons who "possess a firearm" and non-citizens deported for a criminal offense who re-enter the United States.<sup>142</sup>

Deportations based on convictions for criminal offenses lead to re-entry bars of ten to twenty years.<sup>143</sup> For offenders with deep ties in the United States or those whose families are unable to move with them to their country of citizenship, such long-term separation is very difficult to endure. Because penalties for illegal re-entry after conviction are severe, a substantial number of immigration violations consist of felonious re-entry.<sup>144</sup>

The severity of the re-entry bar is partly responsible for the high recidivism rate. Other violations of collateral consequences may be due to their relative obscurity or difficulties in interpretation. The interplay of federal

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140. See VA. CODE ANN. § 24.2-1004 (Michie 2001) (providing that all unqualified persons who vote shall be guilty of "Class 1 Misdemeanor").

141. See 20 U.S.C. § 1070a et. seq. (2000) (setting forth federal Pell Grant regulations).

142. See OFFICE OF THE PARDON ATT'Y, U.S. DEPT. OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY 14-18 (1996) (discussing loss of federal firearms privileges for felons); 8 U.S.C. § 1326 (2002) (setting penalties for re-entry of removed aliens).

143. See 8 U.S.C. § 1326(b)(1) (2000) (establishing maximum sentence of ten years if removal from United States followed "a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony)"); 8 U.S.C. § 1326(b)(2) (establishing maximum of twenty years when removal followed "a conviction for commission of an aggravated felony").

144. In 1997, of about 16,000 convictions for immigration and nationality offenses, almost 2,680 consisted of re-entries of deported non-citizens. The only larger category was made up of aliens who entered illegally (approximately 6,330). See IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION & NATURALIZATION SERVICE 195 tbl.72 (1999).

and state provisions enhances the danger of criminal prosecutions. Frequently, state offenders are not being alerted to federal restrictions, such as the right to carry firearms, and federal offenders do not know about state limitations on many aspects of their lives. Therefore, violations of collateral consequences are often triggered by ignorance or desperation.

#### B. *Recidivism, Destruction of Families and Anomie*

Civil sanctions turn all offenders, especially poor, female and minority offenders, their families and their communities, into "collateral damage." For drug offenders, collateral consequences come on top of already long prison sentences and often amount to a virtual life sentence. These restrictions frequently lead to re-offending and ultimately re-imprisonment.

Arguments of "user accountability" and deterrence traditionally supported collateral consequences. They, nevertheless, impact predominantly the worst off by denying them assistance upon release from prison and creating significant obstacles to their reintegration.

The denial of basic rights affects not only the offender and her family, but also her community. Many communities to which drug offenders return suffer disproportionately from lack of cohesion, unemployment, homelessness and family instability.<sup>145</sup> By increasing the number of obstacles facing ex-offenders, their chances of succeeding in this environment are further reduced, with detrimental consequences for these communities.<sup>146</sup>

In light of the dramatic effects of the war on drugs, which have been aggravated by collateral sanctions, what can be done? How can we decrease the crime rate while re-integrating those that have become the casualties of the war on drugs?

#### IV. A "MARSHALL PLAN"

Neither the mere abolition of collateral consequences nor a narrow approach to re-entry of offenders will resolve the problems surrounding the annual release of thousands of inmates. What is called for instead is a visionary, Marshall Plan-like approach that will address our national interests in societal stability and reduced crime after a devastating "war."

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145. See Petersilia, *supra* note 39, at 3 (discussing adverse impact returning drug offenders have on community); see also SABOL & LYNCH, *supra* note 63, at 19-20 (noting access to jobs and services is limited in re-entry communities).

146. See Petersilia, *supra* note 39, at 3 (describing studies which indicate that inmates returning to their communities from prison increase community crime rates, and thus, have a destabilizing effect on such neighborhoods); see also LaFree et al., *supra* note 28, at 25-26 (indicating impact of returning offenders and their reincarceration upon communities).

A. *The Marshall Plan*

After the defeat of the Axis powers, the Allies occupied Germany. Because of increasing disagreements among the Allies, a growing Communist threat and the increasing restlessness of the German population, Secretary of State George C. Marshall proposed a plan to restore Europe.<sup>147</sup> Its goal was to create a stable and prosperous Europe.<sup>148</sup> In his speech, Marshall noted that an economic future was crucial to prevent disturbances by desperate people.<sup>149</sup>

Two crucial elements relevant to the reintegration of drug offenders contributed to the development of the Marshall Plan. First, in the late 1940s, the United States and Great Britain perceived the need for an economically and politically strong Germany in order to remedy economic problems arising from occupation and to contain the threat of Communism.<sup>150</sup> The interest in rebuilding Germany was based partly on self-interest, including the goal of lessening the heavy tax burden the occupation caused,<sup>151</sup> and partly on the desire to assure peace and stability.<sup>152</sup> Second, and perhaps surprisingly, the United States did not consider the German population unredeemable even after the extent of Nazi atrocities in the Holocaust became public. It punished those who had participated in war crimes and crimes against humanity,<sup>153</sup> and those who had supported the Nazi government. Subsequently, however, it provided the initial funds for the rebuilding of Europe through the Marshall Plan. The Plan was so successful that Europe has become an economic powerhouse second only to the United States. Japan, another major economic power today, also benefited from U.S. assistance after its defeat.

A Marshall-type plan has also been proposed for the rebuilding of Afghanistan following U.S. attacks on that country and the collapse of the Taliban regime and, on a larger scale, for the entire developing world. It

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147. See Secretary of State George C. Marshall, Address at the Commencement Exercises of Harvard University (June 5, 1947), *reprinted in* CHARLES L. MEE, JR., *THE MARSHALL PLAN: THE LAUNCHING OF THE PAX AMERICANA* app. 2, at 271-73 (1984). In a recent speech President Bush explicitly compared his plan for the rebuilding of Afghanistan to the Marshall Plan. True peace, he argued, can only be guaranteed once a stable government and a viable economic infrastructure exist. See James Dao, *Bush Sets Role of US in Afghan Rebuilding*, N.Y. TIMES, Apr. 18, 2002, at A1.

148. See JOHN GIMBEL, *THE ORIGINS OF THE MARSHALL PLAN* 1 (1976) (describing multiple goals of Marshall Plan).

149. See Marshall, *supra* note 147, at 273.

150. See GIMBEL, *supra* note 148, at 6, 140.

151. See Marshall, *supra* note 147, at 272.

152. See GIMBEL, *supra* note 148, at 195-96.

153. See, e.g., TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 79 (Alfred A. Knopf ed., 1992) (discussing Nuremberg indictments). The Nuremberg trials and those trials held subsequently in Germany prosecuted offenders for war crimes, crimes against humanity and crimes against peace. See *id.* The outcome of the Nuremberg trial ranged from executions and long-term incarceration to acquittals.



is based on the same concepts as the original plan, not charity but “a frank recognition that like peace, prosperity [is] indivisible; that to be sustained it [must] be shared; and that to achieve this goal require[s] a new public purpose and international cooperation on a massive scale.”<sup>154</sup>

Only an equally broad-based and forward looking plan can counter the destructive policies of the war on drugs that have made it impossible for ex-offenders to re-enter society successfully.

#### B. *A Marshall Plan At Home*

Why have incarcerative sentences and collateral consequences for drug offenders increased over the last decade? Largely punitive goals have animated legislative changes: Drug offenders should not be allowed to take advantage of the welfare system but instead made to feel the impact of their actions. A loosening of restrictions seems impossible, largely because the “goals” of the war on drugs—however unclearly defined—have not been realized. This is the wrong approach, however. While the “war” may not be over, “collateral damage” must be addressed, not in the least to prevent further alienation of those negatively impacted by the “war.” Those who have served their sentences must be reintegrated to minimize the overall loss of human capital.

In contrast to the view of Germany after World War II, the war on drugs seems premised on the assumption that drug offenders are expendable. While the United States needed a strong Western Europe for economic and political reasons, the reintegration of ex-drug offenders is treated as if it were societally irrelevant. The punishment of Germany ended with the trials of those responsible for the war and the atrocities committed by the Nazis, the imposition of large reparation payments and the creation of a democratic Germany. The punishment of drug offenders through civil sanctions, however, continues long after they have served the sentence imposed by the criminal justice system.

No country can afford to write off a large number of its population—and large the number has become in the last two decades.<sup>155</sup> Restrictions on the reintegration chances of offenders negatively impact not only the offenders themselves, but also affect their families and communities, and ultimately society. The consequences of unemployment, homelessness and lack of education will be family instability and disintegration, an increase in crime and the virtual collapse of entire communities consisting

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154. Gordon Brown, Address to the New York Federal Reserve (Nov. 16, 2001), available at [http://www.hm-treasury.gov.uk/Newsroom\\_and\\_Speeches/Press/2001/press\\_126\\_01.cfm?](http://www.hm-treasury.gov.uk/Newsroom_and_Speeches/Press/2001/press_126_01.cfm?) (last visited Apr. 17, 2002); Gordon Brown, Address to the Washington Press Club (Dec. 17, 2001), available at [http://www.hm-treasury.gov.uk/Newsroom\\_and\\_Speeches/Press/2001/press\\_146\\_01.cfm?](http://www.hm-treasury.gov.uk/Newsroom_and_Speeches/Press/2001/press_146_01.cfm?) (last visited Apr. 17, 2002); see also Dao, *supra* note 147 (outlining President Bush’s “Marshall Plan” for rebuilding of Afghanistan).

155. See SABOL & LYNCH, *supra* note 63, at 9 (noting, that in 1998, of 561,000 offenders released from prison, almost one-third were drug offenders).

of individuals who are being denied economic recovery and political participation.<sup>156</sup> Those consequences are similar to developments Secretary of State Marshall envisioned would occur without his assistance plan.

For those reasons, the prevailing attitude towards ex-offenders is shortsighted. To create a safer society and prevent the vicious cycle of re-offending and re-incarceration, drug offenders must be reintegrated successfully. The Marshall Plan, with its ultimately successful integration of Germany into the group of constitutional democracies, can serve as a model.

Despite the devastation caused by the Nazi government, the United States did not consider Germany's population, including those who supported the Third Reich, unredeemable. Only that attitude could have justified the financial support provided to the rebuilding of Germany at that time. There is no reason to view drug offenders who have served their sentences differently. After having been sanctioned by the official system, they should be able to count on the solidarity of their fellow members of society, as symbolized through our welfare system.<sup>157</sup> Perceptions of deserving and undeserving have driven much of the development of welfare law in this country. Nevertheless, in the 1996 overhaul of welfare legislation, Congress recognized that the neediest require some material support to become self-reliant—the ultimate goal of any welfare system. The punitive denial of even such limited support presumes, however, that society does not have any responsibility for those who once offended against it.<sup>158</sup>

Such an assumption violates basic human rights norms, important on the international plane. The war on drugs has given the United States a negative image abroad, largely because of its disproportionate impact on African-Americans.<sup>159</sup> The denial of basic necessities of life, including housing and food, and disenfranchisement would contribute to this portrayal. So far, only the secrecy in which collateral consequences are shrouded has prevented the United States from being marked a human rights violator because many of its citizens lack rights that other countries

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156. See Petersilia, *supra* note 39, at 3 (noting increase in crime where poverty and social instability exists).

157. See Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (providing public assistance benefits to qualified individuals). Even after the cuts in the 1996 welfare legislation, the federal government promises some, albeit limited, support for those individuals who have fallen on hard times and need governmental support payments. See Candice Hoke, *State Discretion Under New Federal Welfare Legislation: Illusion, Reality, and a Federalism-Based Constitutional Challenge*, 9 STAN. L. & POL'Y REV. 115, 116-18 (1998) (outlining benefits provided under Personal Responsibility and Work Opportunity Act of 1996).

158. See Cynthia Godsoe, Note, *The Ban on Welfare for Felony Drug Offenders: Giving a New Meaning to "Life Sentence"*, 13 BERKELEY WOMEN'S L.J. 257, 257 (1998) (lamenting that federal welfare law's lifetime ban on benefits to anyone convicted of drug-related felonies disproportionately impacts women of color).

159. See generally Note, *Winning the War*, *supra* note 17 (describing impact of war on drugs on African-Americans).

consider basic.<sup>160</sup> These necessities of life should not be reserved only for the deserving, but should be available for all members of the community who need them.<sup>161</sup>

In this environment a Marshall Plan is crucial. It should encompass a number of elements to help convicted offenders rebuild their lives, and assist us in rebuilding our communities and society. Collateral consequences that deny ex-offenders the tools necessary to be re-integrated successfully should be ended.<sup>162</sup> On human rights and crime-prevention grounds, welfare benefits, drug treatment and educational assistance, which are most important upon release, should be available to all ex-offenders. Without this assistance, the chances for successful reintegration seem minimal. For the same reasons, drug offenders should be provided with the possibility of re-uniting with their family and especially with minor children. Automatic disenfranchisement should be abolished because it denies ex-offenders the right to participate in the political process.<sup>163</sup> Deportation should again become discretionary to allow for the consideration of the offender's rehabilitation efforts and family and community ties. Ex-offenders should not be treated better than the rest of the population but should receive equal treatment.

Certain rights of ex-offenders, such as full access to the labor market, can be restricted but only after an individualized risk assessment.<sup>164</sup> Rehabilitation and lack of danger to the community should be important factors in opening employment to ex-offenders. The denial of rights should be reviewed regularly and kept relatively short-lived for most offenders.<sup>165</sup> Certain professions, such as nursing and pharmacy jobs, in which ex-offenders would have access to narcotics, may be closed to drug offenders

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160. See Demleitner, *supra* note 34, at 153 (noting society's general lack of interest in collateral consequences associated with current sentencing regime).

161. See Godsoe, *supra* note 158, at 257.

162. See TRAVIS ET AL., *supra* note 26, at 46 (asking for reassessment of network of collateral sanctions to prevent it from creating barriers to reintegration).

163. See Demleitner, *supra* note 87, at 804 (proposing ways to restrict disenfranchisement).

164. See Travis, *supra* note 32 (manuscript at 23); ABA Task Force, *supra* note 3, at 9 (discussing factors for assessing administrative disqualifications).

Some courts have struck down employment bars as unconstitutional when they constituted total bans based solely on a prior conviction. See, e.g., *Davis v. Bucher*, 451 F. Supp. 791, 803 (E.D. Pa. 1978) (holding City of Philadelphia hiring policy that prohibited employment of former drug users unconstitutional); *Nixon v. Commonwealth*, 189 A.2d 376, 382 (Pa. Commw. Ct. 2001) (holding law barring ex-drug offenders, among others, from working at nursing homes unconstitutional since it makes no exceptions for rehabilitated ex-offenders); see also *Mixon v. Commonwealth*, 759 A.2d 442, 451-52 (Pa. Commw. Ct. 2000) (striking down disenfranchisement of ex-offenders for five years following their release from incarceration).

165. See Demleitner, *supra* note 34, at 156-58. Some commentators go even further and demand that so-called collateral sanctions be imposed by the judge at sentencing, to underscore that they are part of the sentencing process. See generally ABA Task Force, *supra* note 3.

unless they can show successful drug rehabilitation. In those cases, however, drug convictions would trigger a risk assessment rather than an automatic and permanent bar. Such risk assessment can also be viewed as a gradual reward scheme. Every step toward rehabilitation will be rewarded with greater access to the labor market.

In all the above respects, the "Marshall Plan for Drug Offenders" resembles the original Marshall Plan. The Marshall Plan was based on the reduction of barriers for German economic recovery through America's substantial financial and logistical support in the country's rebuilding. The post-war reconstruction of Germany focused on long-term changes.<sup>166</sup> The contrast between a "war," which requires quick and concentrated action, and rebuilding of a society, which needs multiple, long-term approaches, is starkest at this point.<sup>167</sup>

Germany was bound into an economic, political and military alliance that allowed it to become a fully independent and economically successful nation. However, its independence and economic success developed slowly and under the constant supervision and with the assistance of the Western Allies. A similar model should be followed with regard to drug offenders.

The present re-entry partnerships funded by Congress and the proposed Offender Reentry and Community Safety Act<sup>168</sup> both focus on managing the risk released offenders pose to the community by enhancing their supervision and providing them with support. The first step toward such a two-prong approach is in the abolition of collateral consequences that undermine the "Marshall Plan for Drug Offenders."

## V. CONCLUSION

Incarcerated offenders would benefit from a discharge plan, akin to the one established for those in need of care who are released from hospitals or mental institutions.<sup>169</sup> Despite differences between the two groups, a detailed plan guarantees stability, assures the patient as to what to expect and provides for ongoing care and support. Most importantly, just as patients are not released with additional, secretly imposed disabilities, we should not saddle ex-offenders—who already suffer from the stigma of a

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166. See SALLIE PISANI, *THE CIA AND THE MARSHALL PLAN* 36 (1991).

167. See Richard S. Gebelein, *The Rebirth of Rehabilitation: Promise and Perils of Drug Courts*, in, SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY 6 (U.S. Dep't of Justice ed., May 2000).

168. See S. 194, 107th Cong. (2001).

169. See, e.g., LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 24 SEATTLE U.L. REV. 373, 419-21 (2000); see also Demleitner, *supra* note 72, at 246 (discussing suggestions of recent study by Vera Institute of Justice).

18 U.S.C. § 3624 mandates that prisoners who are about to be released from imprisonment spend a maximum of six months under conditions that will allow them to adjust to re-entry.

criminal record—with additional disabilities that make successful integration and re-entry a virtual mirage. Instead it is time to remedy the drug war's "collateral damage" and begin rebuilding.